Supreme Court, U.S.
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No. 93-1745

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DONALD E. KILPATRICK
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

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STATEMENT OF THE CASE

On or about June 13, 1989, Bill Camp, an attorney in Houston, Texas, suffered a severe brain injury during a medical procedure which was being performed on an outpatient basis. Bill Camp's wife, Susie, was appointed to serve as Temporary Guardian for Bill on June 20, 1989, and Permanent Guardian on September 1, 1989. (Pet. Ex. 7; S.F. 126).

On July 19, 1989, while Mr. Camp was still hospitalized, Donald E. Kilpatrick ("Kilpatrick") went to visit him at the Texas Institute for Research and Rehabilitation (TIRR) and proceeded to obtain a signature, allegedly Bill Camp's, on a Power of Attorney form which authorized Kilpatrick to prosecute a medical

malpractice claim on behalf of Bill Camp. (Pet. Ex. 1; S.F. 273-274). Kilpatrick initiated this contact. His visit was not requested nor solicited by Bill Camp or any family member on behalf of Bill Camp. (S.F. 26; 274).

At the time Kilpatrick solicited Bill Camp, both a guardian and an attorney ad litem had been appointed to represent Camp as a result of a finding that he was incompetent. (Pet. Ex. 7; S.F. 156; 275). Kilpatrick knew or reasonably should have known that Bill Camp was not capable of exercising reasonable judgment in employing a lawyer. In making this contact, Kilpatrick solicited employment for himself to prosecute a suit or collect a claim,

intending to obtain an economic benefit for himself.

Before Kilpatrick left the hospital, Bill Camp's mother, Barbara Camp, and Joseph Dale Dodd, a family friend, met Kilpatrick. (S.F. 98-99). When Kilpatrick told them that he had obtained a contract to pursue a medical malpractice claim, Mr. Dodd informed Kilpatrick at that time that Bill Camp was not mentally competent to make a contract, that Susie Camp had been appointed as Bill's guardian, and that the family was already looking into finding an attorney. (S.F. 115-116).

On July 20 1989, Kilpatrick telephoned Susie Camp at her home and told her that Bill had retained

him. Susie Camp informed Kilpatrick that she was Bill's temporary guardian and that Kilpatrick did not have her authorization to proceed with a lawsuit or take any action on behalf of Bill Camp. (S.F. 130-131). Yet, even after this information was given to him, Kilpatrick associated the law firm of Hornbuckle and Montgomery to file a lawsuit in District Court in Harris County the very next day, naming Bill Camp as Plaintiff. (Pet. Ex. 2).

Given this, on October 6, 1989, Robert S. MacIntyre, Jr., an attorney representing Susie Camp, sent Kilpatrick a letter which requested Kilpatrick relinquish the "contract" he had obtained. (Pet.

Ex. 3; S.F. 185-186). Kilpatrick responded by letter dated October 10, 1989, claiming that he had suffered damages due to the interference of the family with his "contract" and offering to surrender the "contract" and claims of interference for $277,000.00. (Pet. Ex. 4).

Because of Kilpatrick's refusal to give up his claim to Bill's case, Susie Camp was hampered in her ability to find and retain a competent attorney to handle the malpractice claim. (S.F. 135). Ms. Camp was ultimately forced to take Kilpatrick to court to have the Power of Attorney declared void and get a court order declaring Kilpatrick had no autority to

represent either Bill Camp or his guardian. (Pet. Ex. 5).

However, even after the Court declared Kilpatrick's contract void, he continued to attempt to extract $277,000.00 by threatening to file a motion to recuse the probate court judge unless this amount of money was paid. (S.F. 196).

The State Bar of Texas filed a disciplinary lawsuit against Kilpatrick alleging specific acts of misconduct. (T. 17). The case was tried to a jury before the Honorable Leonard E. Hoffman, Jr. The jury returned a verdict in favor of the State Bar which found:

> **That Donald E. Kilpatrick did initiate contact with Bill Camp as a prospective client for the purpose of obtaining professional employment when he knew or reasonably should have**

known that Bill Camp could not exercise reasonable judgment in employing a lawyer.

That Donald E. Kilpatrick engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in obtaining the signature of Bill Camp on a power of attorney employing him as an attorney to prosecute a medical malpractice claim.

That Donald E. Kilpatrick engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in asserting that Bill Camp was competent to enter into a contract.

That Donald E. Kilpatrick engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in associating other attorneys to file a lawsuit on behalf of Bill Camp after being advised that Bill Camp was the subject of a temporary guardianship.

That Donald E. Kilpatrick engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in requesting payment of $277,000.00 to relinquish his claims under the contract signed by Bill Camp.

That Donald E. Kilpatrick did with intent to obtain an

> **economic benefit for himself, solicit employment for himself to prosecute a suit or to collect a claim.** (T. 5).

Based on these answers, the trial court found that Kilpatrick had violated the following Disciplinary Rules:

DR 1-102(A)(1): [a lawyer shall not violate a disciplinary rule].

DR 1-102(A)(4): [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation].

DR 1-102(A)(5): [a lawyer shall not engage in conduct that is prejudicial to the administration of justice].

DR 1-102(A)(6): [a lawyer shall not engage in conduct that adversely reflects on his fitness to practice law].

DR 2-103(D)(1): [a lawyer shall not initiate contact with a prospective client for the purpose of obtaining professional employment].

Article X, Section 7(5) State Bar Rules: [engaging in conduct which constitutes barratry as defined by the law of this state].

Article X, Section 7(1) State Bar Rules: [acts or omissions by a lawyer, individually or in concert with another person or persons, which violate the Texas Code of Professional Responsibility, whether or not the acts or omissions occurred in the course of a lawyer-client relationship].

The trial court entered a judgment of disbarment against

Kilpatrick. The Court of Appeals for the Fourteenth District of Texas reversed the judgment of the trial court (See P. 19 of Appendix to Kilpatrick's Petition for Writ of Certiorari).

The Supreme Court of Texas reversed the judgment of the court of appeals and affirmed the disbarment of Kilpatrick from the practice of law. (See App. 1-19).

OBJECTION TO JURISDICTION

The Petition for Writ of Certiorari should be denied as Petitioner, Donald E. Kilpatrick ("Kilpatrick"), has failed to establish jurisdiction in accordance with either Rule 10.1(a) or 10.1(b) of the Rules of the Supreme Court of the United States or with 28 U.S.C.

§ 1257. No federal question was decided by the state court of last resort. The only issues before and addressed by the Texas Supreme Court involved the propriety of the trial court in allowing a trial amendment and a review of the discipline imposed. (App. 1-18).

Nor does the case involve the validity of a State statute in connection with the Constitution of the United States. Kilpatrick cites Disciplinary Rule 2-103(A) as a statute involved in this case. DR 2-103(A) was never at issue at any point in the disciplinary proceedings and consequently is of no relevance in the proceeding before this Court. Kilpatrick was

not found to have violated DR 2-103(A). Rather, the trial court entered a finding of professional misconduct based upon DR 2-103(D). Kilpatrick also cites Canon 7 or EC 7-1 as "statutes" involved in this case. Neither Canon 7 nor EC 7-1 are statutes and neither was ever addressed by any court in any context.

While couched in terms of constitutional deprivations, a review of Kilpatrick's "Questions Presented" reveals nothing more than Kilpatrick's dissatisfaction with the outcome of his jury trial for professional misconduct and is an attempt by him to relitigate his disciplinary case.

His "Questions" regarding the appointment of a National Committee to look into bar association practices and pro bono services are entirely inappropriate matters for this Court to consider and certainly were not matters raised before any State Court.

Therefore, this Court should deny Kilpatrick's petition for lack of jurisdiction.

ARGUMENT AND AUTHORITIES

Although Kilpatrick's arguments are couched in terms of "national importance," "arbitrary and discriminatory practices," and "state court's constitutional infirmities," what Kilpatrick truly seeks is another forum in which to relitigate the disciplinary

proceeding which led to his disbarment. This is clear from a review of his Petition. His Petition is fraught with a rehash of his arguments made in the Texas courts with respect to his perception of the insufficiency of the evidence to support the jury's findings. He complains that the "trial court's determinations are not supported by the record" and that "there is no evidence that Petitioner engaged in dishonesty, fraud, deceit, or misrepresentation" in violation of DR's 1-102(A)(4), 1-102(A)(5) or DR's 1-102(A)(6). (See p. 25 of Petition).

He also seeks another forum in which to complain of the trial court's rulings on evidentiary and

procedural matters. He complains of the "the cumulative effect of various trial court overruling of Petitioner's objections" such as its ruling on a trial amendment and the submission of the charge to the jury (See. p. 14 of Petition). His alleged complaint concerning the trial court's ruling with respect to a trial amendment allowed at his disciplinary proceeding involves nothing more than the application of Texas Civil Procedure and was accurately and succinctly addressed by the Texas Supreme Court.

Contrary to Kilpatrick's assertions, the trial court's ruling on the trial amendment does not involve the application of *In Re Ruffalo, 390 U.S. 544, 88 S. Ct.*

122, 20 L. Ed. 2d 177 (1968). The trial amendment allowed in Kilpatrick's disciplinary proceeding did not add a new cause of action. It merely added an allegation under a different subdivision of the same article and section of the disciplinary rules. Furthermore, Kilpatrick did not raise his due process claims before any of the lower courts and neither court addrssed such an issue.

Further evidence of his desire for a new trial are his complaints that the Texas Supreme Court violated his rights in "misstating true facts" and his persistence in seeking a review of the discipline imposed by the trial court. (See P. 26 of Petition).

In his attempt to involve this Court in a relitigation of his disciplinary case, Kilpatrick frames his issues as those involving discriminatory practices of the State Bar of Texas. The State Bar of Texas in carrying out its duties and responsibilities to the Texas Supreme Court in regulating the practice of law brought the lawsuit against Kilpatrick for allegations of professional misconduct. The disciplinary proceeding itself was tried to a jury and it was the jury who made the findings and rendered the verdict regarding Kilpatrick's misconduct. On the basis of the jury verdict, the trial court found violations of the Code of

Professional Responsibility and entered a judgment of disbarment. Thus, this case does not involved any "practices" of the State Bar of Texas.

Finally, Kilpatrick's attempt to invoke *In Re Primus, 436 U.S. 422 (1978)* into this this case is completely meritless. Once again, Kilpatrick is simply rearguing what his perception was of the evidence at trial and wholly disregards the jury's finding that he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in requesting payment of $277,000.00 to relinquish his claims under the contract signed by Bill Camp.

SUMMARY AND CONCLUSION

Kilpatrick has failed to properly invoke jurisdiction of this Honorable Court as no federal question was decided by a state court of last resort. His Petition amounts to nothing more than an attempt to retry the disciplinary lawsuit which led to his disbarment.

PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

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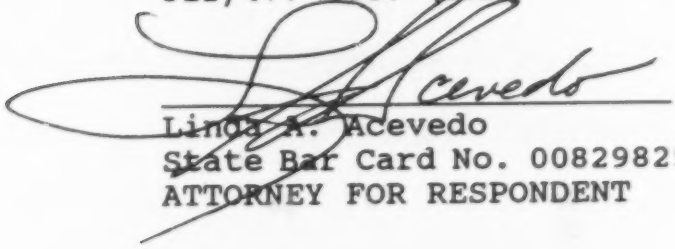
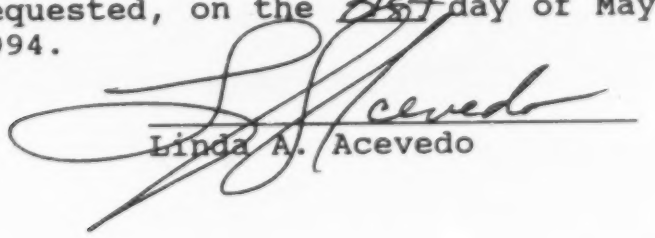


Linda A. Acevedo
State Bar Card No. 00829825
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Donald E. Kilpatrick, at 2723 Triway Lane, Houston, Texas 77043, by delivery of true and correct copies to him by certified mail, return receipt requested, on the 31st day of May, 1994.



Linda A. Acevedo

APPENDIX

IN THE SUPREME COURT OF TEXAS

No. D-4055

The State Bar of Texas, Petitioner

v.

Donald E. Kilpatrick, Respondent

On Application for Writ of Error to the Court of Appeals for the Fourteenth District of Texas

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PER CURIAM

In this disciplinary proceeding, the court of appeals reversed and remanded the trial court's order disbarring Donald Kilpatrick for soliciting employment in violation of State Bar disciplinary rules. We reverse the judgment of the court of appeals, and render judgment disbarring Kilpatrick.

Bill Camp, a Houston attorney, suffered brain damage during a routine medical procedure on June 13, 1989. A week later, on June 20, his wife was appointed as his temporary guardian. On September 1, 1989, she became his permanent guardian.

Kilpatrick visited Camp at the Texas Institute for Research and rehabilitation on July 19, 1989. During this meeting, Kilpatrick obtained Camp's signature on a power of attorney, which purported to authorize Kilpatrick to represent Camp in a medical malpractice claim. Only Kilpatrick and Camp were present, and neither Camp, his family, nor any legal representative requested or authorized Kilpatrick's

visit. Kilpatrick later testified he knew Camp only as a "brother in the bar," that they had not been close friends or socialized together, and that their only previous acquaintance had been as opposing counsel on some criminal cases. He said that he had heard of Camp's misfortune through a law firm that, in turn, had learned the news from the emergency room physician on duty at the time of Camp's injury. Kilpatrick learned of Camp's location by calling Camp's office.

On July 21, 1989, two days after Kilpatrick obtained Camp's signature, Hornbuckle & Montgomery, the firm that had contacted Kilpatrick, filed a malpractice lawsuit against the doctors who

treated Camp. When Ms. Camp learned of Kilpatrick's actions, she told Kilpatrick that the power of attorney was invalid, that she was Camp's guardian, and that Bill Camp was in no condition to retain a lawyer. Ms. Camp also hired a probate lawyer, Robert McIntyre, to assist her with the guardianship.

At Ms. Camp's behest, McIntyre went to Kilpatrick's office and demanded that Kilpatrick relinquish any claim to represent Camp under the power of attorney. Kilpatrick refused, and insisted on a referral fee. When McIntyre repeated his demand to Kilpatrick in a letter dated October 6, 1989, Kilpatrick demanded $277,000.00 in exchange for his release.

As guardian, Ms. Camp filed a Tex. R. Civ. P. 12 Motion for Attorney to Show Authority with the probate court concerning Kilpatrick's power of attorney. On November 17, 1989, the probate court determined that Camp was mentally incompetent on the date he signed the power of attorney, and that Kilpatrick had no authority to represent him.[1] The probate court also directed Kilpatrick to reimburse Ms. Camp for the attorneys' fees she had incurred as a result of his actions. On December 8, 1989, the same day the court issued its order, Kilpatrick

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[1]Some time after the court held Kilpatrick was disqualified, Ms. Camp retained Richard Mithoff to handle the malpractice claim. Mithoff eventually reached a settlement with Camp's doctors.

appeared at McIntyre's office with an unfiled Motion to Recuse the probate judge. Kilpatrick threatened to file the motion unless Ms. Camp paid him the requested referral fee.

In April 1991, the State Bar filed a disciplinary action against Kilpatrick, charging him with violations of five disciplinary rules. At trial, the jury found that Kilpatrick (1) initiated contact with a prospective client for the purpose of obtaining employment, (2) engaged in conduct involving dishonesty, deceit, or misrepresentation, and (3) with intent to obtain an economic benefit to himself, solicited employment for himself to prosecute or collect a

claim. On March 13, the trial court rendered judgment on the verdict, disbarring Kilpatrick.

The court of appeals reversed the trial court's judgment and remanded for new trial on two grounds. ____ S.W.2d ____. First, the court of appeals held that the trial court had erroneously permitted the State Bar to amend its pleadings at trial to include an allegation of barratry. *Id.* at ___. Second, the court held that the trial court abused its discretion in ordering disbarment based on a single act of solicitation. *Id.* at ___. We disagree with the court of appeals on both counts.

The State Bar's expert witness, Fred Hagans, testified on the issue

of barratry, first during cross-examination by Kilpatrick's attorney, and then on redirect examination. At the subsequent charge conference, the State Bar requested a trial amendment alleging barratry as defined in Tex. Penal Code Ann. § 38.12(a) (Vernon Supp. 1993), *reprinted in* Tex. Penal Code Ann. § 38.12 note (Vernon Sup. 1994) (Historical and Statutory Notes), *amended by* Tex. Penal Code Ann. § 38.12(a) (Vernon Supp. 1994). Over Kilpatrick's objection, the trial court permitted the trial amendment, and included the issue in the charge.

If evidence is objected to at trial on the ground that it is not within the issues made by the

pleadings, the court *may* allow the pleadings to be amended and *shall* do so freely when the presentation of the merits will be subserved thereby and the objecting party failed to satisfy the court that the amendment would prejudice that party in maintaining the action or defense on the merits. Tex. R. Civ. P. 66 (emphasis supplied). A court may not refuse a trial amendment unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face. *Greenhalgh v. Service Lloyds Ins. Co.*, S.W.2d 938, 939 (Tex. 1990). The burden of showing surprise or prejudice rests on the party

resisting the amendment. *Id.* If the trial amendment is not mandatory, then the decision to permit or deny the amendment rests within the sound discretion of the trial court. Tex. R. Civ. P. 66: *Greenhalgh,* 787 S.W.2d 939. In such a case, the court's decision to allow or deny a trial amendment may be reversed only if it is a clear abuse of discretion. *Hardin v. Hardin,* 597 S.W.2d 347, 349-50 (Tex. 1980).

The court of appeals held that the trial amendment alleging barratry was "prejudicial on its face" because it added a new cause of action. ____ S.W.2d at ___. In so doing the court of appeals effectively held that all

nonmandatory trial amendments under Rule 66 must be rejected. To the contrary, we hold that the decision to grant or deny the trial amendment was discretionary, and under the circumstances the trial court did not abuse that discretion.

The trial amendment added an additional cause of action to the extent it alleged another ground of attorney misconduct under former Article X, Section 7 of the State Bar Rules. *See also* Gov't Code Ann., Tit. 2, Subtit. G, App. A-1 (Vernon Supp. 1994) (current version of same rule). The initial pleadings alleged multiple forms of attorney misconduct in violation of State Bar Rules, Art. X, § 7(1), which is a general prohibition

concerning acts or omissions that violate the Texas Code of Professional Responsibility. The trial amendment added an allegation under a different subdivision of the same article and section of the disciplinary rules. State Bar Rules, Art. X, § 7(5) ("engaging in conduct that constitutes barratry as defined by [Tex. Penal Code Ann. § 38.12(a) (Vernon Supp. 1993)"]. *See also* Tex. R. Disciplinary P. 1.06(Q)(5) (1992) (current version).

The central allegation in the State Bar's initial complaint was that Kilpatrick violated former Tex. Code Professional Responsibility DR 2-103(D)(1), which prohibited attorneys from initiating contact with prospective clients for the

purpose of obtaining employment if the lawyer knew or reasonably should have known the person could not have exercised reasonable judgment in employing a lawyer. *See also*, Tex. Disciplinary R. Prof. Conduct 7.02 (1989), *reprinted in* Tex. Gov't Code Ann., Tit. 2, Subtit. G, App. A (Vernon Supp. 1994) (State Bar Rules, Art. X, § 9). Former DR 2-103(D)(1) shares common elements with the criminal offense of barratry,[2] and the evidence presented at trial supported discipline under either theory. Thus, the trial court, in its

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[2]Barratry is the solicitation of employment to prosecute or defend a claim with intent to obtain a personal benefit. Tex. Penal Code Ann, § 38.12(a)(3) (Vernon Supp. 1993), *amended by* Tex. Penal Code Ann. § 38.12(a) (Vernon Supp. 1994).

discretion, could reasonably have concluded that the trial amendment did not impair Kilpatrick's ability to present his defense. We therefore hold that the trial amendment did not involve the kind of calculated surprise or unfair prejudice that would render it an abuse of discretion.

The court of appeals further based its reversal of barratry in criminal proceedings: "[T]here was no criminal prosecution, yet, the State Bar obtained a finding of criminal wrongdoing without the hardship of the higher burden of proof which is necessary for a conviction." ____ S.W.2d at ____. The court of appeals erred, however, in its assumption that an attorney

may not be disciplined for barratry in civil proceedings without first being convicted in criminal proceedings. While barratry is a crime for which an attorney may be prosecuted, a criminal prosecution is not a prerequisite to disciplinary proceedings based on that offense. Tex. Gov't Code Ann. § 82.062 (Vernon 1988) ("Any attorney who is guilty of barratry . . . may be [disciplined] . . . regardless of whether the attorney is being prosecuted for, or has been convicted of the offense."). Thus we hold that the trial amendment resulted in no unfair prejudice, and was clearly within the trial court's discretion.

The court of appeals also concluded that the trial court's judgment should be reversed because the sanction of disbarment was so disproportionate to Kilpatrick's misconduct that it constituted an abuse of discretion. ___ S.W.2d at ___. We disagree.

The court of appeals characterized Kilpatrick's misconduct as an "isolated act of solicitation." Comparing it to other reported disciplinary cases in which the attorney misconduct "was much more egregious but in which the appellate court approved lesser sanctions," the court concluded that the sanction of disbarment was "so heavy" as be an abuse of discretion. ___ S.W.2d at ___.

The judgment of a trial court in a disciplinary proceeding may be so light, or so heavy, as to constitute an abuse of discretion. *See State v. Ingram*, 511 S.W.2d 252, 253 (Tex. 1974). At the same time, the trial court has broad discretion to determine whether an attorney guilty of professional misconduct should be reprimanded, suspended, or disbarred. *Id.; State v. O'Dowd*, 312 S.W.2d 217, 221 (Tex. 1958). In determining the appropriate sanction for attorney misconduct, a trial court must consider the nature and degree of the professional misconduct, the seriousness of and circumstances surrounding the misconduct, the loss or damage to clients, the damage to the

profession, the assurance that those who seek legal services in the future will be insulated from the type of misconduct found, the profit to the attorney, the avoidance of repetition, the deterrent effect on others, the maintenance of respect for the legal profession, the trial of the case, and other relevant evidence concerning the attorney's personal and professional background. Tex. R. Disciplinary P. 3.10 (1992). The court may, in its discretion, hold a separate evidentiary hearing and take evidence on these issues. *Id.*

The sanction of disbarment does not turn on whether an attorney has engaged in a single act, as opposed to repeated and systematic pattern,

of misconduct. Under Disciplinary Rule 3.10, a multitude of factors must be considered. In light of the facts and circumstances presented, we cannot say that the trial court abused its discretion, and we disagree with the court of appeals that the sanction of disbarment is disproportionate to Kilpatrick's misconduct.

We therefore grant the application of the State Bar and, without hearing argument, a majority of the court reverses the judgment of the court of appeals, and renders judgment disbarring Kilpatrick. Tex. R. App. P.170.

Opinion Delivered: January 5, 1994.